Supreme Court, U.S.
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No. 99-117

IN THE

Supreme Court of the United States

LUMBERMENS MUTUAL CASUALTY COMPANY,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns the interpretation of ambiguous language in an insurance policy drafted and issued by Petitioner, Lumbermens Mutual Casualty Company. The "Questions Presented" are:

I. Whether Lumbermens Was Afforded a Proper Jury Trial on the Question of Whether Coverage Existed under an Insurance Policy Drafted and Issued by Lumbermens Where the Jury Found the Parties Did Not Have a Mutual Intent Regarding the Meaning of the Determinative Policy Language "and Such Contract Has Been Accepted by WMATA."

II. Whether the District Court Properly Concluded that Granite Had Standing to Maintain Its Claim.

III. Whether the District Court in Attempting to Resolve Ambiguous Language in an Insurance Policy Drafted and Issued by Lumbermens Properly Barred Witness Testimony Which Did Not Bear on the Parties' Mutual Intent.

IV. Whether the District Court Properly Held that PMA and Liberty Had Not Agreed in Settlements to Limit Their Claim for Damages for Pre-Judgment Interest and Allowable Attorney Fees.

V. Whether the District Court Properly Determined that Maryland Law Applied Where the Location of the Risk, Alleged Defective Condition, and the Underlying Injury All Occurred in Maryland.

LIST OF PARTIES

The Respondents herein are:

Granite Construction Company

S.J. Groves & Sons Company

Liberty Mutual Insurance Company

Pennsylvania Manufacturers Association Insurance Group

The Appellees below included Truland Corporation ("Truland") and The Philadelphia Bourse, Inc. d/b/a E.C. Ernst ("Ernst"). Truland and Ernst were subsequently dismissed and are not parties to this proceeding.

STATEMENT PURSUANT TO RULE 29.6

None of the Respondents has a parent corporation and there are no publicly held companies which own 10% or more of the stock of any Respondent.

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Appendix A — Excerpts From Transcript Of Oral Argument Of The United States Court Of Appeals For The District Of Columbia Circuit Dated December 3, 1998 ..... R. App. 1

OPINIONS BELOW

The decisions of the Court of Appeals on the suggestion for rehearing *en banc* and petition for rehearing (App. C, 38a-39a) are unreported.[1] The opinion of the Court of Appeals (App. A, 1a-3a) is unreported. The opinions, judgments and orders of the District Court (App. B, 4a-37a) are unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISION INVOLVED

Respondents' position is that there is no constitutional issue legitimately involved in this Petition. However, Petitioner asserts that there is a Seventh Amendment issue:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

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1. Citations herein to "__a" are to the Appendices filed by the Petitioner. Citations herein to "R. App. __" are to the Appendix filed herewith by the Respondents.

STATEMENT OF THE CASE

A. Procedural History

S.J. Groves & Sons Company ("Groves"), Granite Construction Company ("Granite"), Pennsylvania Manufacturers Association Insurance Group ("PMA"), and Liberty Mutual Insurance Company ("Liberty"), (collectively the "Respondents"), and Ernst and Truland, former contractors, subcontractors, and certain insurers thereof, filed a declaratory judgment action seeking defense and indemnification by Lumbermens Mutual Casualty Company ("Lumbermens" or "Petitioner") for damages stemming from an accident that occurred at the Addison Road Metro Station in Prince Georges County, Maryland. The Respondents argued that they were entitled to defense and indemnity under a general comprehensive liability policy (the "Policy") issued by Lumbermens, which provided liability insurance coverage to the Washington Metropolitan Area Transit Authority ("WMATA") and any contractor or subcontractor of WMATA. The Policy contained an endorsement (Endorsement 7A) which extended coverage to liabilities arising three years after (1) operations have been completed, *and* (2) the contract has been accepted by WMATA. Endorsement 7A, states:

> [T]his policy does not apply, except with respect to WMATA, to bodily injury or property damage included within the Completed Operations Hazard or Products Hazard if such bodily injury or property damage occurs more than (3) years following the time when all operations to be performed by a named insured having a general or prime contract with WMATA have been

> completed *and such contract has been accepted by WMATA* but only with respect to those operations under the completed and accepted contract.[2]

The Policy defined when operations were deemed to be completed under the definition of "completed operations hazard."[3] The Policy did not, however, contain any definition of the term "accepted" or the phrase "and such contract has been accepted by WMATA." The critical question in this litigation has been the proper construction of the term "accepted" within the completed operations endorsement.[4]

The District Court found that the policy language "and such contract has been accepted by WMATA" was ambiguous. A jury trial subsequently was held to determine whether the ambiguity in the language could be resolved with the aid of extrinsic evidence and, if so, to determine when the contract was accepted. At the conclusion of the jury trial, the jury determined it was not able to resolve the ambiguity based on the mutual intent of the parties. In accordance with the jury's verdict, the District Court construed the policy language against Lumbermens, and in favor of coverage for the Respondents.

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2. Completed Operations Endorsement 7A, Brief of Appellant, Vol. II, Appellate App. at 00836 (filed Aug. 19, 1998) (emphasis added).

3. Completed Operations Endorsement 7, Vol. II, Appellate App. at 00835 (filed Aug. 19, 1998).

4. Mem. Op. & Order at App. 7a (Dec. 21, 1995) ("[t]his case turns on the proper construction of the term 'accepted' in the insurance policy").

Lumbermens appealed the District Court's holding, based on numerous allegations of error.[5] The Court of Appeals found only two of Petitioner's claims had merit. The Court of Appeals held that Petitioner was entitled to a jury trial on the amount of damages recoverable for attorney fees in the underlying cases and also held that two of the parties below — Truland and Ernst — should have been dismissed as not the real parties in interest. Lumbermens subsequently petitioned the Court of Appeals for rehearing, including rehearing *en banc* on all issues not remanded to the District Court. This petition was denied without opinion.

B. Factual Background

On May 21, 1976, WMATA contracted with a joint venture consisting of Groves and Granite ("Granite-Groves") for the construction of the Addison Road Metro Station in Prince Georges County, Maryland — Contract No. 1G0031. As a general contractor on the project, Granite-Groves, in turn, subcontracted the electrical work first to Ernst, and later to Truland.

On June 4, 1987, one person was killed and two persons were injured as a result of an electrical-related accident at the Addison Road Metro Station. In connection with that accident, the Respondents herein were named as third-party defendants[6] in three separate lawsuits filed in the United

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5. While Petitioner states in its brief that it raised nine issues on appeal, in fact, Petitioner presented the Court of Appeals with eleven claimed errors.

6. Initially, WMATA was the only defendant named in the actions.

States District Court for the District of Columbia.[7] The lawsuits were settled prior to trial.

On October 23, 1989, Respondents filed a declaratory judgment action seeking insurance coverage under the Policy. The Respondents argued that they were entitled to insurance coverage because WMATA did not accept the contract until June 8, 1984, via a letter from WMATA to Granite-Groves. That letter stated, in relevant part "this letter is to advise you formally of the Authority's acceptance of the contract." In addition, in response to interrogatories, WMATA stated on two occasions that the final acceptance of the contract was made by the June 8, 1984 letter.[8] Accordingly, pursuant to Endorsement 7A — which provides three years of completed operations coverage — the Respondents were entitled to insurance coverage until June 8, 1987. Lumbermens countered by arguing that the contract was accepted before June 8, 1984.

REASONS FOR DENYING THE WRIT

In seeking a writ of certiorari, Petitioner argues that it was denied its right to a jury trial on all issues in violation of the Seventh Amendment and in contravention of the laws of Maryland and the District of Columbia. Petitioner also alleges that the District Court erred in its determination that Maryland law applied. Petitioner further alleges error by the District Court in limiting the testimony of certain witnesses

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7. (1) *Estate of Alice Lucy v. WMATA*, C.A. No. 87-2630 (JHG) (D.D.C. complaint filed Sept. 24, 1987); (2) *Butler v. WMATA*, 87-3425 (GHR) (D.D.C. complaint filed Dec. 17, 1987); and (3) *Artis v. WMATA*, 87-2319 (HHG) (D.D.C. complaint filed date unknown).

8. In one instance, WMATA later retracted its original position.

and in its application of law. Petitioner argues that, except for the two issues which the Court of Appeals reversed, "the court of appeals failed to address any of the other issues raised by Lumbermens."[9] Lumbermens' Petition should be denied. As demonstrated below, none of Petitioner's claims warrants review by this Court because they are factually incorrect and/or the issue was properly decided below. Furthermore, Petitioner has failed to demonstrate an important federal question or a decision by the Court of Appeals that so far departs from the accepted and usual course of judicial proceedings or sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. *See* S. Ct. R. 10.

I.

PETITIONER WAS AFFORDED A PROPER JURY TRIAL ON THE QUESTION OF WHETHER THERE WAS COVERAGE UNDER THE POLICY.

A. The Court of Appeals Considered Petitioner's Claims of Error

As a threshold matter, Petitioner contends that the Court of Appeals did not consider its claim that it was not afforded a proper jury trial.[10] Petitioner's claim is without any factual basis whatsoever. Indeed, as evidenced by the Court of Appeals' action in reversing the District Court on two issues, the Court of Appeals carefully considered all of Petitioner's allegations of error. However, the Court of Appeals'

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9. Petitioner Br. at 3.

10. Petitioner Br. at 7-8.

Memorandum Opinion makes clear that it found "only two" of Petitioner's claims had merit:

> Lumbermens appeals, claiming that the verdict was tainted by a variety of errors committed by the trial court.
>
> Two, but only two, of Lumbermens' arguments have merit.[11]

The principal authority relied upon by Petitioner in asserting its claim that the Court of Appeals erred is *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Petitioner's reliance on *Russell* is misplaced. *Russell* concerned a case where the Court of Appeals stated explicitly that it deferred to the interpretation of state law made by the federal judge of that state, apparently without engaging in a *de novo* review.[12] The Supreme Court "conclude[d] that a court of appeals should review *de novo* a district court's determination of state law."[13] *Russell* does not have any direct relevance to this case. The Petitioner has not identified any evidence to indicate that the Court of Appeals' holdings below resulted from an impermissible deference to the District Court's interpretation of state law. Moreover, *Russell* does not hold that the Court of Appeals must conduct a *de novo* review of every allegation of error by the District Court. Certainly, different standards of review apply to different issues. For example, with respect to issues involving

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11. Memorandum Op. at App. 3a.

12. 499 U.S. at 230.

13. *Id.* at 231.

supervision of litigation — like the District Court's ruling limiting witness testimony concerning so called "newly discovered" evidence — it is especially common for such issues to be given abuse-of-discretion review. *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988); *see also Washington Hosp. Ctr. v. Cheeks*, 394 F.2d 964, 965-66 (D.C. Cir. 1968). In any event, there is simply no evidence that the Court of Appeals failed to engage in the appropriate standard of review of Petitioner's various allegations of errors.

Petitioner also complains that the Court of Appeals' written opinion did not discuss the court's rationale on each point of error raised by Petitioner that was rejected by the Court, focusing instead on those issues as to which the District Court's decision was reversed. The Court of Appeals was not required, however, to write a lengthy opinion on each of the "barrage of issues," in the court's own words, raised by Petitioner on appeal.[14] In this regard, to the extent *Russell* has any relevance, albeit only by analogy, it is worthwhile to note the Court's statement therein that "[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion."[15]

B. Petitioner's Claim That It Was Denied a Proper Jury Trial Is Factually Without Merit

Petitioner argues that the District Court failed to permit the jury to determine the meaning of the policy language, "and

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14. Transcript of Appellate Argument dated December 3, 1988 ("Appellate Argument") at R. App. 2.

15. *Russell*, 499 U.S. at 233.

such contract has been accepte[illegible] WMATA."[16] Petitioner's claim is factually misleading. The parties below engaged in an intensive jury trial to decide whether the ambiguity in the language could be resolved through extrinsic evidence. At the conclusion of the trial, the jury was presented with two questions for resolving the issue of whether coverage existed under the Lumbermens policy. First, the jury was asked to determine whether the ambiguity in the Policy language could be resolved, based upon the mutual intent of the parties. Second, if there was a discernable mutual intent, the jury was to determine when the contract was accepted. The Verdict Form reflects the two-step procedure given to the jury.[17]

On November 13, 1996, the jury found that the parties who negotiated the Policy did not have a mutual intent regarding the meaning of the Policy term "accepted."[18] Because the jury decided that it could not resolve the ambiguity regarding what "accepted" was intended to mean, it never, and properly could not, reach the second step of deciding when the contract was accepted. What Petitioner is really complaining about is the procedural manner in which the case was framed for the jury's consideration and not that it was denied its right to a jury trial. As recognized by the Court of Appeals, "[a]ll you're [Petitioner] really challenging on the jury issue though, is where the burden was placed."[19] These types of

16. Petitioner Br. at 7.

17. *See* Verdict form at 30a-31a.

18. As intimated by the Court of Appeals at oral argument, resolution of this issue governed whether or not there was insurance on the date of the occurrence. Appellate Argument at R. App. 4-5.

19. *Id.* at R. App. 4.

decisions are routinely made by trial court judges each day and do not merit this Court's review. The law is well settled that the District Court has wide discretion in the presentation of evidence at trial.[20]

II.

RESPONDENT GRANITE CONSTRUCTION COMPANY IS A PROPER PARTY TO THIS ACTION.

Lumbermens asserts that the District Court and Court of Appeals were in error by failing to dismiss this case against Granite. Lumbermens' argument is that because the insurers of Granite initially paid the damages sought and then Granite reimbursed its insurer 100%, it cannot pursue this case.

Granite did pay 100% of the damages it incurred. This was sworn to in the Affidavit of William L. Elkins. The District Court was correct in denying Lumbermens' Motion to Strike this Affidavit since Lumbermens did not support its Motion with any sufficient reason as to why said Affidavit should be stricken. Federal Rule of Evidence 1002 did not prevent the lower court from considering said Affidavit, nor did any other Rule. It also needs to be remembered that Lumbermens never raised the issue of Granite not being a proper party plaintiff for over seven years; its Motion raising this issue was not filed until October 15, 1996. The Plaintiffs' (Respondents' herein) Motion for Judgment on Damages,

20. *Johnson v. Mortham*, 915 F. Supp. 1574, 1581 (N.D. Fla. 1996) (citing *Geders v. United States*, 425 U.S. 80 (1976)); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir.), *cert. denied*, 502 U.S. 950 (1991); *see also Machesney v. Brundi*, 905 F. Supp. 1122, 1130 (D.D.C. 1996); Fed. R. Evid. 611(a).

which contained all supporting documentation as to how the damages sought in this case were initially paid, was filed on July 8, 1993. Lumbermens filed a Motion for Summary Judgment on November 1, 1995, and never raised the issue of Granite not being a proper party plaintiff.

In sum, the lower courts' decisions were correct and properly applied this Court's decision in *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 381 (1949).

III.

THE DISTRICT COURT PROPERLY BARRED WITNESS TESTIMONY WHICH DID NOT BEAR ON THE PARTIES' MUTUAL INTENT.

Petitioner contends that the Court of Appeals failed to consider Petitioner's claim that the District Court erred in refusing to permit witnesses to testify about their intent, interpretation, and understanding of the ambiguous policy language at issue.[21] Petitioner cites only one of the District Court's stated reasons — the witnesses' admitted failed recollection — for why the testimony in question was restricted.[22] However, the District Court restricted the testimony for several different reasons, including whether the offered testimony regarding intent was unilateral or shared, the untimeliness of the proffered testimony, and whether the testimony amounted to "opinion" from witnesses who were not designated as experts. The courtroom colloquy and the resulting opinion shows that the Court of Appeals did consider Petitioner's various claims but simply was not

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21. Petitioner Br. at 12.

22. *Id.*

persuaded by Petitioner's arguments regarding the limitations imposed. For example:

> THE COURT: [T]his sort of intent was sort of developed very late in the process, after discovery.
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> * * *
>
> THE COURT: No. I'm referring to the material that you wanted to get before the Court. The Court wouldn't allow you to bring in.
>
> MR. LOPATA: We . . . wanted to get that from the witnesses and the Court refused to allow me to bring out any evidence concerning what they intended —
>
> THE COURT: Which was a shift. It was inconsistent with what they had said earlier. Right?
>
> MR. LOPATA: I believe so, Your Honor.
>
> THE COURT: Yeah. You think the District Judge abused her discretion for refusing to allow you to do that?
>
> MR. LOPATA: Yes. We asked for an amendment of the pre-trial statement. We gave the parties notice. We gave them at least three week's notice. We indicated that they would be available to have the depositions of the witnesses who were recalling facts and discussions that occurred more than two decades before. And they were able to

> recall at least a month before trial, as to what the intent was for having the accepted contract in the language. And we moved to amend our pre-trial statement so we could assert that defense. And she abused her discretion by not allowing us to have our witnesses to testify.
>
> With regard —
>
> THE COURT: If you're wrong about that, what's left of your case?[23]

The above exchange exemplifies the Court of Appeals' knowledge and understanding of the record and the attention given to Petitioner's claims of error regarding the restrictions imposed by the District Court on witness testimony, and there are additional examples. One of Lumbermens' key witnesses at trial on the issue of intent was Samuel Asquith. Mr. Asquith negotiated and drafted the insurance policy at issue on behalf of Lumbermens. At trial, Mr. Asquith testified, "I am at a loss at this point in time to explain how we put such a phrase [and such contract has been accepted by WMATA] together," and was not permitted to testify as to his unilateral uncommunicated intent or interpretation of the ambiguous policy language.[24] At oral argument, the Court of Appeals offered that it found Mr. Asquith's testimony "*devastating*" to Petitioner's case.[25] In sum, as a factual matter, the record demonstrates that there is no merit to

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23. Appellate Argument at R. App. 2-4.

24. Trial Transcript, dated Nov. 17, 1996, Vol. I Appellate App. at 00401.

25. Appellate Argument at R. App. 6 (emphasis added).

Petitioner's desperate contention that the Court of Appeals failed to consider its claims of error regarding witness testimony.

Petitioner also argues that the District Court's rulings limiting certain testimony strayed so far from the mandate of the law that they represented substantial departures from the accepted and usual course of judicial proceedings.[26] Contrary to Petitioner, the District Court's evidentiary rulings were well in accordance with established contract law. A party can only be bound by a particular meaning of a provision of a contract if the party is aware of that meaning.[27] Moreover, "[e]vidence of intent may be considered in testing the reasonableness of alternative interpretations of a writing only when there is reason to believe the intent was shared." *Haeberle v. Texas Int'l Airlines*, 738 F.2d 1434, 1440 (5th Cir. 1984). In *Eagle Star & British Dominions Ins. Co. v. Fleischman*, 175 Md. 433, 2 A.2d

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26. Petitioner Br. at 12.

27. *Smith v. Hughes Aircraft Co.*, 783 F. Supp. 1222, 1226 D. Ariz. 1991) (citing *Restatement (Second) of Contracts* § 211 (1981)), *aff'd in part and rev'd in part on other grounds*, 10 F.3d 1448 (9th Cir. 1993) ("when dealing with standardized, boilerplate contracts, the Court would enforce the reasonable expectations of the insured and bind them only to those known terms"); *Carey Canada, Inc. v. California Union Ins. Co.*, 720 F. Supp. 1018, 1026 (D.D.C. 1989) ("In reviewing the extrinsic evidence to determine the intent of the parties, we have placed great importance on the objective manifestation of the parties' intent and understanding, as shown by their acts, conduct, and communications, not on their subjective, *unexpressed* intent.") (emphasis supplied), *aff'd in part and rev'd in part*, 940 F.2d 1548 (D.C. Cir. 1991); *Owens-Illinois Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1522 (D.D.C. 1984) ("Implicit in this statement is a finding that extrinsic evidence of the parties subjective intent or construction is irrelevant to the policies' interpretation.").

424 (1938) the Maryland Court of Appeals explicitly held that the insurer's contention that it did not intend to insure certain properties under a fire insurance policy could not bind the insured when there was no evidence that the insurer's intent was made known to the insured. Petitioner has not cited to a single case that supports *the proposition that the unilateral uncommunicated intent of one party is a relevant inquiry for the jury*. Rather, the cases Petitioner cites[28] all stand for the general proposition that if a contract is ambiguous, extrinsic evidence may be used to determine *the intention of the parties*.

Petitioner argues that the District Court erred in refusing to allow the jury to hear certain testimony of the witnesses who were responsible for drafting the Policy language.[29] These persons principally involved Messrs. Asquith (representing Petitioner) and Erickson (representing WMATA). The record is clear that these negotiators did not have a mutual intent regarding the Policy language at issue. Indeed, they both testified that they did not communicate their particular intent with each other or with WMATA. As previously indicated, Mr. Asquith testified that he could shed no light on the parties' mutual intent of the language. Similarly, Mr. Erickson testified that he also had no recollection of the intent of the subject language:

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28. These cases cited by Petitioner include: *1010 Potomac Assoc. v. Grocery Mfrs. of Am. Inc.*, 485 A.2d 199, 205 (D.C. App. 1984); *Canaras v. Lift Truck Servs. Inc.*, 272 Md. 337, 352, 322 A.2d 866 (1974); *Admiral Builders Sav. & Loan Ass'n v. South River Landing, Inc.*, 66 Md. App. 124, 132, 502 A.2d 1096 (1986); *Chicago Bd. Options Exch., Inc. v. Connecticut Gen. Life Ins. Co.*, 713 F.2d 254, 258 (7th Cir. 1983); and *International Bhd. of Painters & Allied Trades v. Hartford Accident & Indem. Co.*, 388 A.2d 36, 43 (D.C. App. 1978).

29. Petitioner Br. at 12.

Q: Is it fair to say you do not recall the intent of that language [and such contract has been accepted]?

A: I do — I do not recall any anything about the intent of that.[30]

Thus, as Lumbermens must concede, these critical witnesses could have offered only their unilateral, uncommunicated intentions regarding completed operations coverage under the Policy. Such testimony is not permissible under Maryland law, and the District Court correctly precluded that testimony. Therefore, there is no merit to Petitioner's claim that this Court need grant its Petition on the ground that the District Court's rulings represented substantial departures from the accepted and usual course of judicial proceedings.

IV.

THE DISTRICT COURT'S DECISION NOT TO LIMIT THE DAMAGES RECOVERABLE BY PMA AND LIBERTY FOR PRE-JUDGMENT INTEREST AND ALLOWABLE ATTORNEYS FEES WAS APPROPRIATE.

Lumbermens asserts that the lower courts' decisions failed to properly interpret a settlement agreement. Specifically, Lumbermens argues that the lower courts were in error in awarding Ernst/PMA and Truland/Liberty interest and fees because of a settlement agreement in one of the underlying cases in which those plaintiffs agreed to limit

30. Trial Transcript, dated Nov. 17, 1996, Vol. I Appellate App. at 00393.

their recovery to a capped amount.[31] There is no merit to Lumbermens' argument.

First, Lumbermens discusses the settlement in the *Lucy* case, implying that the settlement agreement in that case was the only agreement that was the subject of the declaratory judgment action. In fact, however, there were three underlying cases and three separate settlement agreements in each of those underlying cases which were the subject of the declaratory judgment action and for which the plaintiffs sought reimbursement. The settlement agreement in the *Artis* case was completely silent with respect to any claims made against the policy issued by Lumbermens. The settlement agreements in the *Butler* and *Lucy* cases specifically stated that the release of claims in those cases would not apply to claims for insurance coverage made against the policy issued by Lumbermens. The *Butler* case had no agreement to cap any such recovery. Thus, Lumbermens' claim that Ernst/PMA and Truland/Liberty should not be able to recover in excess of the cap agreed to in the settlement, even if valid, would be of no consequence since the current insurance coverage litigation also concerns the *Artis* and *Butler* cases.

With respect to the settlement in the *Lucy* case, that agreement provided that Truland/Liberty agreed to limit any recovery "*against the policy*" to a sum no higher than $225,000 and Ernst/PMA agreed to limit any recovery "*against the policy*" to a sum no higher than $250,000. Exhibit C to Plaintiff's Motion for Judgment on Damages (Docket No. 196). The only claims Ernst/PMA and Truland/Liberty have made against the Lumbermens policy are the claims for reimbursement of the settlement amounts in the underlying cases, and the attorneys fees incurred to

31. Petitioner Br. at 14.

defend those underlying actions. Those amounts total less than the caps agreed to in the *Lucy* settlement agreement. The claims made by Ernst/PMA and Truland/Liberty for prejudgment interest and attorneys' fees incurred in the current declaratory judgment action are not claims against the Lumbermens' policy for coverage of the underlying matter, but rather, are additional costs for which the law provides reimbursement due to Lumbermens' refusal to defend and indemnify its insureds. That amount is above and beyond any amounts reimbursed pursuant to an insurance policy.

The *Osternack*[32] case relied upon by Lumbermens offers no support to its claim of error. In *Osternack*, the Court held that a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a motion under Rule 59(e). The Court noted that prejudgment interest was part of the compensation due the plaintiff and therefore was not collateral to the judgment with respect to the filing of an appeal. In contrast, the Court noted that attorneys' fees under 42 U.S.C. § 1988 (1994 & Supp. III 1997) were separable from the underlying merits of the controversy.

Similarly, Maryland decisions have held that prejudgment interest should ordinarily be allowed as a matter of course when the plaintiff's damages are liquidated. *See, e.g., I.W. Berman Properties v. Porter Brothers, Inc.*, 276 Md. 1, 344 A.2d 65, 77 (1975). In *Brethren Mutual Insurance Co. v. Filsinger*, the Maryland Court of Special Appeals ruled that regardless of an insurance company's good faith denial of coverage, an insured is entitled to recover interest from the date the coverage was denied. 54 Md. App. 357, 458 A.2d 880, 885, *cert. denied*, 296 Md. 223, 462 A.2d

32. *Osternack v. Ernst & Whinney*, 489 U.S. 169 (1989).

66 (1983). *See also Foltz v. U.S. News & World Report, Inc.*, 613 F. Supp. 634, 648 (D.D.C. 1985). As indicated, an award of prejudgment interest and attorneys fees is separate from the claim made against the policy.Thus, there is no merit to Lumbermens' argument.

V.

THE DISTRICT COURT CORRECTLY DETERMINED MARYLAND LAW APPLIED.

Lumbermens contends that the District Court erred in applying Maryland law, instead of District of Columbia law, to this action. Lumbermens also contends that the District Court's ruling was not addressed by the Court of Appeals.[33] Lumbermens' criticism of the Court of Appeals is again factually incorrect. The transcript of the appellate argument demonstrates conclusively that the Court of Appeals considered Petitioner's claim that the District Court's decision regarding choice of law was error. In fact, at oral argument the Court of Appeals expressed some initial puzzlement, later dispelled, that Maryland law should apply rather than D.C. law.[34] The Court of Appeals engaged Mr. Fennell, counsel for Respondent Groves, in a direct inquiry on the choice of law issue. *Id.* at R. App. 6-12. Furthermore, Mr. Lopata, counsel for Petitioner, on rebuttal also specifically addressed the choice of law issue. *Id.* at R. App. 13. There is simply no merit to Petitioner's claim that the choice of law issue was not addressed on appeal.

In addition, there is no dispute now, nor was there below, that the choice of law rules of the District of Columbia

33. Petitioner Br. at 16.

34. Appellate Argument at R. App. 6.

apply.[35] The issue that Petitioner seeks to have reviewed by this Court is the District Court's application of that law. Contrary to Petitioner, the District Court did not "ignore" the applicable law of the District of Columbia in determining the applicable law.[36] "With regard to contract issues, the courts of the District of Columbia follow the governmental interest analysis adopted in the Restatement (Second) of Conflict of Laws (1971)." *National Union Fire Ins. Co. v. Binker*, 665 F. Supp. 35, 39-40 (D.D.C. 1987); *see also Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1130 (D.C. Cir. 1989).

The District Court's analysis shows that it applied the proper test in making its choice of law determination. In its first ruling that Maryland law applies here, the District Court noted Maryland's significant interest, stating:

> It is undisputed that the electrical shock which caused the death of Alice Lucy occurred in Maryland. Maryland has a substantial interest in applying the law to determine liability for an injury which results from an allegedly defective condition existing on Maryland property. Maryland also has a significant interest in regulating the safety of construction projects within its borders and assuring that persons who work within the state comply with Maryland standards of conduct.

See Mem. Op. & Order at 9-10 (Sept. 22, 1989). In a subsequent opinion, the District Court also pressed the importance of the

35. Mem. Op & Order at 4 (Sept. 22, 1989) ("All parties agree that the choice of law rules of the District of Columbia must be followed.").

36. Petitioner Br. at 17.

location of the risk being in Maryland.[37] In that regard, the District Court relied, in part, on Section 193 of *Restatement (Second) of Conflict of Laws* (1971). Section 193 provides that the importance of the risk's principal location "enjoys the greatest significance when an *immovable is involved*, such as when the risk insured against is damage by fire to a particular building." *Id.* at 612 cmt. b (emphasis added). Of course, as the District Court found, the accident stemmed from an immovable — "an immobile handhole, embedded in a concrete sidewalk . . . in . . . Maryland." Mem. Op. & Order at 12 (Sept. 22, 1989). Thus, the District Court properly considered District of Columbia law in concluding that Maryland's interests in the litigation were paramount. Therefore, Petitioner's claim of error is without merit.

VI.

THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS FOR REVIEW.

Petitioner alleges that the most egregious error was committed by the Court of Appeals in refusing to address several of Petitioner's arguments raised on appeal.[38] As demonstrated above, however, this claim is unsubstantiated and wildly off the mark. Likewise, Petitioner's assertion that "this case involves issues that are of importance to litigants in general" is without merit.[39] Petitioner's claimed errors by

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37. Mem. Op. & Order at 5 n.3 (Dec. 21, 1995).

38. Petitioner Br. at 18.

39. *Id.* at 17-18.

the District Court all pertain to the resolution of particular ambiguities in an insurance contract that are unlikely to ever repeat themselves. Certainly, none of these decisions can be fairly argued in any respect to be a far departure from the accepted and usual course of judicial proceedings. Furthermore, what Petitioner labels as a "jury trial" issue is factually incorrect and is more accurately described as a litigation management issue. How the jury was instructed to attempt to resolve the ambiguous policy language was a procedural issue properly within the discretion of the trial judge.

CONCLUSION

Petitioner has failed to make a compelling case that this Court should exercise its discretionary review and the Petition should be denied.

Respectfully submitted,

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